Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,
Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,
Respondents.

[Title Continued on Inside Cover]

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR RESPONDENTS, HENRY L. HENDERSON AND THE CITY OF CHICAGO, IN OPPOSITION

BRIAN L. CROWE
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MARDELL NEREIM
Assistant Corporation Counsel
30 North LaSalle Street
Suite 800
Chicago, Illinois 60602
(312) 744-6975
Attorneys for Respondents
* Counsel of Record

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LAND AND LAKES COMPANY,
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CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,
Respondents.

QUESTION PRESENTED

Whether substantive due process requires the City of Chicago to issue an operating permit that would allow a landfill to expand when the City Council has enacted a moratorium on the issuance of operating permits for new or expanded sanitary waste landfills.

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BRIEF FOR RESPONDENTS, HENRY L. HENDERSON AND THE CITY OF CHICAGO, IN OPPOSITION

OPINIONS BELOW

The decision of the Illinois Appellate Court is unpublished. The decision of the Circuit Court of Cook County, Illinois, is unpublished. The Illinois Supreme Court denied the petitioners' petition for leave to appeal to that court. The court's order denying leave to appeal is published at 174 Ill. 2d 565, 686 N.E.2d 1163.

JURISDICTION

As we explain more fully below, petitioners incorrectly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). This Court does not have jurisdiction over this matter because no final judgment of the highest court of Illinois has been rendered within the meaning of section 1257(a). A federal claim remains to be resolved in this case: petitioners' takings claim under the United States Constitution which had been dismissed without prejudice when the City took its appeal to the Illinois Appellate Court and has since been reinstated, remains pending in the Circuit Court of Cook County.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

ORDINANCE INVOLVED

The section of the Municipal Code of Chicago, Illinois, in effect at the time this case was litigated in the Circuit Court of Cook County provided, in pertinent part:

> Prior to February 1, 1996, notwithstanding any provision of this chapter: (1) no permit shall be issued nor modification of any permit allowed for the expansion of any existing sanitary landfill or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste dis-

> posal, and (2) no permit shall be issued for the creation or operation of a new sanitary landfill site or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal.

Municipal Code of Chicago, Ill. § 11-4-1520(F) (1994). This ordinance has since been renewed, most recently at the City Council meeting held on January 14, 1998, and is now effective through February 1, 2000.

STATEMENT

The Chicago Environmental Protection Ordinance requires a City operating permit in order to operate a landfill within the City of Chicago. Municipal Code of Chicago, Ill. § 11-4-5-1500(e)(1990). The moratorium ordinance—at issue in this case—places a temporary moratorium on the issuance of operating permits for new landfills within the City and on permits that would allow an existing landfill to expand. *Id.* § 11-4-1520(F) (1994).

Petitioner Stony Island Reclamation Co. owns a 79-acre parcel of land in Chicago on which petitioner Land and Lakes operates a sanitary landfill. R. Vol. 8 at 1935. Land and Lakes had an operating permit from the City and from the Illinois Environmental Protection Agency (IEPA) allowing it to operate a sanitary landfill on a 53-acre portion of the site. R. Vol. 29, Pl. Ex. 10; R. Vol. 38, Def. Ex. 38. In 1982, Land and Lakes obtained a special use variance from the City's Zoning Board of Appeals under which a permitted use for the entire site is a sanitary landfill. R. Vol. 25, Pl. Ex. 3. Its zoning variance explicitly requires that the use of the site comply with all other applicable City ordinances. *Ibid.* In 1993, Land and Lakes obtained a supplemental permit from the IEPA allowing the operation of a landfill on the entire 79-acre site. R. Vol. 29, Pl. Ex. 49. This permit requires Land and Lakes to comply with all applicable local ordinances. *Ibid.*

In September 1993, Land and Lakes submitted a permit application to the City seeking an operating permit that would allow it to expand its 53-acre landfill to the full 79 acres. R. Vol. 26, Pl. Ex. 6. The City denied the permit on the basis that the moratorium ordinance prohibited the expansion of landfills. R. Vol. 29, Pl. Ex. 14. Land and Lakes then filed this suit seeking to declare the moratorium ordinance unconstitutional on a number of grounds, including substantive due process. Land and Lakes' complaint alleged that the moratorium ordinance denied it substantive due process because it was not rationally related to the purpose of protecting the health, safety, and welfare of the citizens of Chicago. R. Vol. 9 at 1935, p. 25. It also alleged that the moratorium constituted a taking of private property without just compensation in violation of the Fourteenth Amendment of the United States Constitution. *Id.* at p. 26.

A judge of the Circuit Court of Cook County, Illinois, held a hearing in this matter and granted Land and Lakes judgment on its declaratory judgment claim, its preemption claim under state law, its procedural due process claim and its substantive due process claim. Pet. App. A51.[1] Despite numerous factual findings, see *id.* at A36-46, the circuit court made no finding that the moratorium ordinance is not reasonably related to a legitimate government purpose. And in its discussion of the law, the circuit court did not discuss whether the moratorium ordinance violated substantive due process. See *id.* at

[1] Land and Lakes claims in its petition that it has spent $4 million on its landfill since the trial court's ruling in this case. See Pet. 5. This assertion is not supported by anything in the record. The record consists of documents and evidence that were before the trial court and, of course, contains no evidence of factual matters that occurred after the trial court issued its ruling. Moreover, Land and Lakes neglects to mention that it has continued to operate its expanded landfill and continues to do so to date. If it has expended money in order to operate its landfill, it has presumably done so because it continues to make a profit by operating the landfill.

A46-50. Nevertheless, the circuit court entered judgment for Land and Lakes on its claim that the moratorium ordinance violated substantive due process. See *id.* at A51. The circuit court issued a permanent injunction prohibiting the City from applying the moratorium ordinance to Land and Lakes and requiring the City to issue an operating permit to Land and Lakes for expansion of the landfill. See *ibid.*[2]

The Illinois Appellate Court held that the circuit court had erred on all counts on which it entered judgment for Land and Lakes and vacated the injunction issued by the circuit court. Pet. App. A29. As to Land and Lakes' claim that the moratorium ordinance violated its right to substantive due process, the court noted that when an ordinance, like the moratorium ordinance, does not implicate fundamental rights, substantive due process requires only that it bear a reasonable relationship to a proper legislative purpose and that it not be arbitrary or discriminatory. *Id.* at A17. The court then held that the moratorium ordinance was rationally related to public health and welfare because it regulated the dumping of waste within the City. *Id.* at A18. The court concluded that Land and Lakes had not shown that the moratorium ordinance was not rationally related to its legitimate purpose. *Ibid.* The appellate court remanded the matter to the circuit court for further proceedings consistent with its decision, noting that it expressed no opinion on the two counts, including a claim under the Takings Clause of the United States Constitution, that had been dismissed without prejudice, with leave to reinstate. *Id.* at 29-30. The Illinois Supreme Court denied Land and Lakes' petition for leave to appeal to that court. See *id.* at A55. Land and Lakes' takings clause claim has been reinstated

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[2] The circuit court also issued an order stating that there was no just reason for delaying appeal in this case. R. Vol. 14 at 3494. This finding provided the basis for an interlocutory appeal. See Ill. Sup. Ct. R. 304.

in the circuit court, where briefing of the issue has proceeded.

ARGUMENT

Land and Lakes' petition for a writ of certiorari should be dismissed for lack of jurisdiction because its federal takings claim remains pending in the Circuit Court of Cook County. Thus there is no final judgment over which this Court has jurisdiction under 28 U.S.C. § 1257(a).

Even aside from the jurisdictional problem, if the petition is not dismissed, it should be denied. This case is in an interlocutory posture and does not warrant review for that reason alone. Nor does it raise any substantial question for this Court's review. The City Council of the City of Chicago has enacted an ordinance placing a temporary moratorium on the issuance of operating permits for new and expanded landfills. In an unpublished order, the Illinois Appellate Court applied well settled principles of constitutional law to hold that the moratorium on operating permits does not violate substantive due process.[3] Land and Lakes argues that there is confusion over whether a heightened level of scrutiny applies to zoning ordinances that are challenged as violative of substantive due process. There is no such confusion, and even if there were, this case would not be the vehicle for resolving it. Land and Lakes did not argue for any form of heightened review below, and hence has waived such an argument. The precedents on which Land and Lakes relies, in any event, concern judicial review of zoning ordinances, and this ordinance placing a moratorium on the issuance of operating permits to new or expanded landfills is not a zoning ordinance. Thus, even if substantive due process required some form of heightened scrutiny for zoning ordinances, that principle would not apply here.

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[3] Under the Illinois Supreme Court Rules, such an order cannot be cited as precedent. *See* Ill. Sup. Ct. R. 23(e).

1. This Court lacks jurisdiction over Land and Lakes' petition for a writ of certiorari, and it should therefore be dismissed. Under 28 U.S.C. § 1257(a), this Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." As this Court recently reiterated, that section

> establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court."

Jefferson v. City of Tarrant, 118 S. Ct. 481, 485-86 (1997) (quoting *Market Street Railroad Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945)).

The decision in this case does not constitute a final judgment within the meaning of section 1257(a). The Illinois Appellate Court remanded the case to the circuit court, where Land and Lakes' takings claim under the federal Constitution remains pending, along with two state law claims. This is precisely the type of case this Court has described as one in which it does not have jurisdiction: a case where "the state courts have resolved some but not all of the petitioners' claims." *Jefferson*, 118 S. Ct. at 487. As in *Jefferson*, this Court's "jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Ibid.*

While this Court has recognized some limited exceptions to its final judgment rule, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975), it has described them as cases in which "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate review rather than delayed review

would be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Here, a federal question remains to be determined in additional proceedings in the Circuit Court of Cook County. The decision on that issue could require later review by this Court. Given that pending federal claim, this Court lacks jurisdiction at this time. Therefore, the petition for a writ of certiorari should be dismissed.

2. If the Court determines that it has jurisdiction, the petition should be denied. Even petitioners do not claim that the fact-bound question whether the Chicago moratorium on permits for new or expanded landfills is rationally related to a legitimate government interest merits this Court's review. They claim only that some degree of heightened judicial scrutiny is appropriate. They never argued below that the trial court had the authority to employ some heightened form of review to set aside the legislative judgment made by the Chicago City Council to place a moratorium on permits for new or expanded landfills. Nor did they obtain such a finding from the circuit court. This Court does not consider issues not properly presented to the state court that rendered the decision it has been asked to review. See *Adams v. Robinson*, 117 S. Ct. 1028, 1029 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The interlocutory character of this case also argues against review. Petitioners' takings claim remains to be adjudicated. In fact one of the decisions of this Court on which petitioners rely, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), is a takings and not a substantive due process case, and even petitioners acknowledge that at least in some jurisdictions if they have a takings claim, they have no substantive due process claim. See Pet. 21-22. Thus, review at this juncture would be improvident.

3. The petitioners' claim that there is confusion over the correct standard of review of laws regulating land

use is inaccurate. This Court has not employed any heightened form of scrutiny for zoning or other land use regulations challenged as violative of substantive due process. Land and Lakes relies heavily upon this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). There this Court stated that before a zoning regulation can be declared unconstitutional, it must be said that "such provisions are clearly arbitrary, unreasonable, having no substantial relation to the public health, morals, or general welfare." *Id.* at 395. It also explained that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. Thus, under *Euclid,* where it is fairly debatable whether a zoning classification has a substantial relation to public health, morals or welfare, the classification would pass scrutiny for due process concerns. Of course, if an ordinance must be upheld whenever its validity can be fairly debatable, then it need only be rational. This is no form of heightened scrutiny.

Indeed, this Court has more recently clarified the scope of review of a zoning classification when it does not infringe upon a protected liberty interest:

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.
> . . . .
>
> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (citations omitted). Nor has this Court reaffirmed a "heightened test" in other cases, as Land and Lakes claims. See Pet. 15. The cases Land and Lakes

cites do not support its contention. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court rejected Exxon's due process claim because "we have no hesitancy in concluding that [the statute at issue] bears a reasonable relation to the State's legitimate purpose . . . ." *Id.* at 125. Land and Lakes also cites language in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), taken from *Nebbia v. New York*, 291 U.S. 502 (1934), as follows:

> [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained.

447 U.S. at 85 (quoting *Nebbia*, 291 U.S. at 525). But this Court in *PruneYard* plainly had no trouble concluding in one sentence that the regulation at issue was sufficiently related to the State's asserted interest without discussion of any factors associated with a heightened form of scrutiny. See 447 U.S. at 84.

For mysterious reasons, Land and Lakes also cites *Railway Express Agency v. New York*, 336 U.S. 106 (1949), for the proposition that this Court has applied a heightened standard of scrutiny to a substantive due process claim. See Pet. 15. In *Railway Express*, the Court considered a traffic regulation and stated:

> We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Id. at 109. This does not disclose that the Court subjected the ordinance at issue to any heightened form of scrutiny in that case.[4]

An examination of the decisions of lower courts cited by Land and Lakes shows that courts considering substantive due process challenges to zoning classifications are not confusing two standards, as Land and Lakes claims, see Pet. 18, but merely stating the same standard in different ways. This is amply illustrated by the results of the cases that Land and Lakes claims were decided under a heightened level of scrutiny. While Land and Lakes asserts that "there is little, if any, predictability in outcomes," *id.* at 4, in fact, these cases are remarkably predictable and consistent. Every case decided by a court of appeals that Land and Lakes claims applies a heightened level of scrutiny to a zoning classification nevertheless upheld the classification, and with minimal scrutiny at that. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996) ("The Federal Constitution does not empower courts to sit just to second-guess legislative judgments on technical matters like airport safety. The substantive due process claim fails."), cert. denied, 117 S. Ct. 2514 (1997); *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996) (explaining that federal courts are not boards of zoning appeals; thus a plaintiff cannot state a claim that a zoning classification denies substantive due process unless he alleges a violation of some other substantive constitutional right or that available state remedies are inadequate); *Smithfield Concerned Citizens For Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990) ("In

[4] Land and Lakes also incorrectly asserts that Justice Scalia has advocated the application of a higher level of scrutiny to claims that restrictions on property violate substantive due process. See Pet. 20. Justice Scalia, in fact, has written that "I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process." *United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring) (emphasis in original) (citation omitted).

adjudicating substantive due process challenges to zoning ordinances, a court asks only whether a conceivable rational relationship exists between the zoning ordinance and legitimate governmental ends"); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823 (10th Cir. 1988) (upholding the exclusion of churches from residential districts because the validity of the exclusion was "fairly debatable"), cert. denied, 490 U.S. 1005 (1989); *First Assembly of God v. City of Alexandria*, 739 F.2d 942, 944 (4th Cir.) (concluding in a one sentence discussion that the revocation of a special use variance was substantially related to concerns of traffic, road safety, fire prevention, and noise), cert. denied, 469 U.S. 1019 (1984). These cases demonstrate that there is no heightened scrutiny of zoning ordinances and certainly no unpredictability of outcome.

Land and Lakes also suggests that the Court should grant this petition to review two decisions of the Ninth Circuit. See Pet. 21-22. The Ninth Circuit, relying on *Albright v. Oliver*, 510 U.S. 266 (1994), and *Graham v. Connor*, 490 U.S. 386 (1989), has held that a substantive due process claim must be analyzed under the specific amendment to the Constitution that is the source of protection against the governmental action at issue; thus, claims involving property should be analyzed under the Takings Clause. See *Patel v. Penman*, 103 F.3d 868, 874-75 (9th Cir. 1996), cert. denied, 117 S. Ct. 1845 (1997); *Armendariz v. Penman*, 75 F.3d 1311, 1319-21 (9th Cir. 1996) (en banc). But this issue was never raised in this case by any party and was not decided by either the circuit court or the Illinois Appellate Court. And at most this would mean that petitioners' due process claim might be preempted by the Takings Clause, a result that would merely provide an alternate ground to affirm the judgment below. This case, therefore, does not present that issue for review.

4. Even if zoning classifications were subject to some form of heightened scrutiny when they are challenged as

violative of substantive due process, that test would not apply here. The moratorium ordinance is not a zoning ordinance. It does not prescribe or change any zoning classification in the City but applies to all property regardless of how it is zoned. The moratorium is a straightforward environmental control measure governing the operation of waste disposal sites located within the City of Chicago. The Chicago City Council has placed a temporary moratorium on the issuance of operating permits for new or expanded landfills located within the City because it has decided that the City—one of the most densely populated urban areas in the country—cannot accommodate and regulate the operation of new or expanded waste disposal sites. This decision was made to protect the health and safety of the City's citizens and the environment. The regulation of waste disposal serves significant governmental interests and should easily pass constitutional muster.

This ordinance, like the economic regulation considered by this Court in *Exxon Corp.*, 437 U.S. at 124-25, does not violate substantive due process if it bears a reasonable relation to a legitimate governmental purpose. The moratorium is directly related to protection of the environment and to protection of the health and safety of the citizens of the City of Chicago. New or expanded landfills disposing of waste within the City plainly pose an increased risk to health and safety of both citizens and the environment and require more regulation by the City. The Chicago City Council has decided that the City should not undertake such regulation at this time. The moratorium ordinance bears a rational—indeed, a substantial—relationship to a legitimate governmental purpose. The only other case of which we are aware in which a party challenged a moratorium on landfills under substantive due process reached that conclusion. See *Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505, 514 (7th Cir.), cert. denied, 116 S. Ct. 672 (1995). In that case, the Seventh Circuit held that "[c]oncern for

public health is a sufficient reason on its face to pass the *Euclid* test . . . ." *Id.*

Land and Lakes does not address the purpose of the moratorium. Instead, it claims that the ordinance does not have a proper legislative purpose because the City needs landfill space that Land and Lakes can provide because its property has a zoning variance and a State permit for a landfill. See Pet. 25.[5] Its argument amounts to no more than a claim that the City Council made a poor policy decision when it enacted the moratorium ordinance. This Court, however, has stated that even when a party has cast doubt on the wisdom of a statute, "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to 'sit as a superlegislature to weigh the wisdom of legislation . . . .'" *Exxon Corp.*, 437 U.S. at 124 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). The City Council did make a wise decision when it decided to limit landfills in one of the most densely populated urban areas in the country to those that already had operating permits; but even if it did not, courts should not second-guess its decision.

Land and Lakes also argues, see Pet. 24, as it has throughout this litigation, that the City has not proven that the moratorium is sufficiently related to its purpose. This, of course, misses the point. It is Land and Lakes that has the burden of proving that the moratorium is unreasonable. See, *e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962). As the Illinois Appellate Court held, Pet. App. A18, Land and Lakes has not done so.

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[5] Land and Lakes seriously overstates the import of its state permit. As might be expected anytime state and local governments exercise dual regulatory control, that permit on its face requires Land and Lakes to comply with all local regulations. *See* R. Vol. 29, Pl. Ex. 49. The state permit is therefore completely irrelevant to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN L. CROWE
Corporation Counsel of the
City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MARDELL NEREIM
Assistant Corporation Counsel
30 North LaSalle Street
Suite 800
Chicago, Illinois 60602
(312) 744-6975
Attorneys for Respondents

* Counsel of Record